Supreme Court, U.S.
FILED

99 938 DEC 1 - 1999

OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

BILL MORROW, BARRY KEENE,
And BRUCE HENDERSON,
Petitioners,

v.

THE STATE BAR OF CALIFORNIA,
And MEL ASSAGAI,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

PAUL N. HALVONIK
2600 TENTH STREET
SUITE 511
BERKELEY, CA 94710
(510) 486-8200

FRED J. HIESTAND *
1121 L STREET
SUITE 404
SACRAMENTO, CA 95814
(916) 448-5100

Counsel for Petitioner

* Counsel of Record

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

7168

QUESTION PRESENTED

Whether attorney petitioners can, consistent with the First Amendment's guarantee to freedom of association and expression, be compelled to belong to an association that regularly takes political and ideological positions that are repugnant to petitioners' consciences and not germane to improvement of the quality of legal services or regulation of the profession.

PARTIES TO THE PROCEEDINGS

Petitioners

Bill Morrow, Barry Keene, and Bruce Henderson. Petitioners are individuals and have no corporate affiliations.

Respondents

State Bar of California and Mel Assagai.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

JURISDICTION 1

STATEMENT OF THE CASE 1

A. Petitioners Object to Compelled Membership in an Organization that Takes Political Positions on Issues that are Offensive to their Consciences and not Germane to Regulation of the Legal Profession. 3

B. Proceedings Below 6

REASONS FOR GRANTING THE PETITION 7

I. The Court of Appeals' Opinion Mistakenly Interprets *Lathrop* and *Keller* as Holding that An Attorney Can be Constitutionally Compelled to Belong to an Association that Takes Political Positions on Issues Not Germane to the Legal Profession. 9

A. *Keller*, Contrary to the Opinion of the Court of Appeals, Declined to Reach the Issue Presented by this Petition. 9

B. *Lathrop* Did Not, Contrary to the Opinion of the Court of Appeals, Decide the Issue Presented by this Petition; but Analysis of the Views Expressed in *Lathrop* in the Context of Later First Amendment Developments Supports Petitioners' Position. 13

II. Compulsory Membership in the California State Bar, an Organization that Regularly Asserts Political Positions on Matters Not Germane to the Regulation of the Legal Profession, Infringes Petitioners' First Amendment Rights and Cannot be Justified By Any Compelling State Interest. 17

A. Conscripted Membership In Any Organization Infringes First Amendment Rights 17

B. The Proliferation of Voluntary Bar Associations Demonstrates That Compulsory Bar Membership is Unnecessary to Any Compelling State Interest; and that the Expression by the State Bar of Political Positions Not Germane to Regulation of the Legal Profession Runs Afoul of the "Precision of Regulation" Requirement. 25

III. Certiorari Should be Granted Because the Question Presented Herein is Similar to that Presented in *Board of Regents of the University of Wisconsin v. Southworth* 28

CONCLUSION 30

APPENDIX

Appendix A
Ninth Circuit Court of Appeals Opinion and Judgment, 9/2/99 . . . . . 1a

Appendix B
District Court Order and Judgment 11a

Appendix C
District Court Civil Rights Complaint for Injunctive Relief 19a

Appendix D
Message of Governor Pete Wilson on veto of
Senate Bill 1145 . . . . . 26a

TABLE OF AUTHORITIES

Federal Cases **Page**

Abood v. Detroit Board of Education,
431 U.S. 209 (1977) 10, 15

Bandenburg v. Ohio,
395 U.S. 444 (1969) 16

Bates v. Little Rock,
361 U.S. 516 (1960) 23

Board of Regents of the University of Wisconsin v. Southworth, No. 98-1189 . . . . . 8, 28

Brown v. Hartlage,
456 U.S. 45 (1982) 18

Buckley v. Valeo,
424 U.S. 1 (1976) 17

Chicago Teachers Union v. Hudson,
475 U.S. 292 (1986) 23

Ellis v. Brotherhood of Railway Clerks,
466 U.S. 435 (1984) 18

Grunwald v. San Bernardino City Unified School District,
994 F.2d 1370 (9th Cir. 1993),
cert. denied, 510 U.S. 964 (1993) 20

Keller v. State Bar of California,
496 U.S. 1 (1990) . . . . . *passim*

Keney v. New York,
388 U.S. 440 (1967) 9

Lathrop v. Donohue,
367 U.S. 820 (1961) . . . . . *passim*

Morrow v. State Bar of California,
188 F.3d 1174 (9th Cir. 1999) . . . . . *passim*

NAACP v. Button,
371 U.S. 415 (1963) 23

Neitzke v. Williams,
490 U.S. 326 (1989) 2

Perry v. Snidermann,
408 U.S. 593 (1972) 15

PG & E v. Public Util. Comm'n,
475 U.S. 1 (1986) 20

Roberts v. United States Jaycees,
468 U.S. 609 (1984) 17, 23

Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819 (1995) . . . 29

Schneider v. State, 308 U.S. 147 (1939) 25

Sherbert v. Verner, 374 U.S. 398 (1963) 23

Southworth v. Grebe, 151 F.3d 717 (7th Cir. 1998) 29

Sugarman v. Dougall, 413 U.S. 634 (1973) 15

West Virginia Bd. Of Educ. v. Barnette, 319 U.S. 624 (1943) 18, 22

Wooley v. Maynard, 430 U.S. 705 (1977) 18, 22

State Cases

In re Attorney Discipline System, 19 Cal. 4th 582 (1998) 5

Federal Statutes

28 U.S.C. § 1343 2
42 U.S.C. § 1983 2
42 U.S.C. § 1988 2

State Statutes and Bills

Cal. B & P C § 6002 3
Cal. B & P C § 6064 3
Cal. B & P C § 6125 3
Assembly Bill 75 (1997) 4
Assembly Bill 250 (1997) 4
Assembly Bill 492 (1997) 4
Senate Bill 48 (1997) 4
Senate Bill 1145 (1998) 5

United States Constitution

First Amendment . . . . . *passim*

Rules Cited

FRCP 12(b)(6) 2

Other Authorities

Bradley A. Smith, *The Limits of Compulsory Professionalism: How the Unified Bar Harms the Legal Profession*, 22 *FLA. ST. UNIV. L. REV.* 35 (1994) 14

Ralph Brock, *Giving Texas Lawyers Their Dues: The State Bar's Liability Under Hudson and Keller for Political and Ideological Activities*, 28 *ST. MARY'S L.J.* 47 (1996) 13

David Luban, *The Disengagement of the Legal Profession: Keller v. State Bar of California*, 5 THE SUPREME COURT REV. 163 (1990) 26-27

Deborah Graham, *ABA's Increased Politicization, "Liberalism" Draw Fire, Praise*, AMERICAN LAWYER, August 9, 1982, p.25 28

DIRECTORY OF LOBBYISTS, LOBBYING FIRMS, AND LOBBYIST EMPLOYERS (California Secretary of state 1999) 26

Edward A. Tomlinson, *Bar Unification—A Caveat*, 26 MD. L. REV. 240 (1966) 14

James B. Lake, *Lawyers, Please Check Your First Amendment Rights at the Bar: the Problem of State-Mandated Bar Dues and Compelled Speech*, 50 WASH. & LEE L. REV. 1833 (1993) . . . . . *passim*

Note, *Less Drastic Means and the First Amendment*, 78 YALE L. J. 464 (1969) 25

William Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968) 15-16

Petitioners, current and former elected public officials who are members of the State Bar of California, respectfully seek a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-10a) is reported at 188 F.3d 1174 (9th Cir. 1999). The opinion of the district court (App. 11a- 18a) is unreported.

JURISDICTION

The court of appeals entered its judgment on September 2, 1999 (App. 1a). This petition is timely under Supreme Court Rule 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

Petitioners Bill Morrow, Barry Keene and Bruce Henderson are all members of the State Bar of California ("State Bar") and current or former elected public officials. While they differ in their political registrations and beliefs, they agree that no attorney can be constitutionally compelled to belong to the State Bar so long as it takes political positions on a variety of issues, including bills pending in the California Legislature, that are anathema to his individual conscience and not germane to regulation of the profession.

Unable to effectively disassociate themselves from the State Bar without giving up their right to practice law, petitioners filed their lawsuit in the federal district court for the Eastern District of California on June 17, 1997. Jurisdiction was invoked under 28 U.S.C. §1343, and relief was sought under The Civil Rights Act, 42 U.S.C. §§1983 and 1988. They sought injunctive and other appropriate relief to stop the Bar from asserting political and propagandistic views on behalf of California's lawyers that have nothing to do with the improvement of legal services or regulation of the profession.[1] The complaint also named as a defendant, Mel Assagai, a registered contract lobbyist hired by the State Bar to assist its staff lobbyists in promoting the State Bar's positions on various measures pending in the California Legislature.

Respondents moved to dismiss on the ground that petitioners did not assert a valid First Amendment claim. The district court agreed with respondents and dismissed the complaint because it believed that this Court had, in *Keller v. State Bar of California*, 496 U.S. 1 (1990) and *Lathrop v. Donohue*, 367 U.S. 820 (1961), upheld mandatory bar membership so long as members are not compelled *financially* to contribute to political activities. The court of appeals

---

[1] Since this case arises on appeal from a motion to dismiss pursuant to FRCP 12(b)(6), the sole issue is whether the facts pleaded by petitioners, if established, would support a claim for relief. (*Neitzke v. Williams*, 490 U.S. 326-27 (1989.) To aid the Court in making this determination, the complaint is reprinted in App. 19a-25a.)

affirmed in reliance on its reading of the holdings in *Keller* and *Lathrop*.

A. Petitioners Object to Compelled Membership in an Organization that Takes Political Positions on Issues that are Offensive to their Consciences and not Germane to Regulation of the Legal Profession.

State Senator Bill Morrow, a Republican and former State Assemblyman - Barry Keene, a Democrat and former State Senate majority leader - and J. Bruce Henderson, a former San Diego City Councilman - are all active members of the State Bar. This is not, to be sure, a matter of their choice; they belong to this organization because they are required to in order to practice law. (*Keller*, *supra*, 496 U.S. at 14; see also, Cal. B & P Code §§ 6002, 6064, & 6125.)

While petitioners disagree with each other on a variety of political issues, they concur on the basic principle animating this case: no person can, as a condition of being allowed to practice a profession, constitutionally be required to belong to an organization that expresses political positions on issues not germane to the regulation of that profession and counter to that person's conscientious beliefs.

Petitioners cited four bills then pending before the 1997-1998 bi-annual session of the California Legislature as examples of political positions taken by the State Bar that

were offensive to the deeply held beliefs of one or more of them, and not germane to regulation of the profession. The State Bar took an affirmative position in support of all four of these bills:

(1) AB 250 – would triple the $250,000 ceiling on non-economic damages in medical negligence cases in specified circumstances and repeal it in others.

(2) AB 75 – would prohibit civil compromises in all domestic violence cases.

(3) SB 48 – would add a "hostile work environment" as a ground of sexual harassment so that an employee who feels he or she encountered conduct unwelcome and sufficiently severe or pervasive to constitute an offensive working environment would be able to obtain compensatory or punitive damages against the employer.

(4) AB 492 – would permit actual, compensatory and punitive damages to be awarded for discrimination or different treatment in any aspect of employment or opportunity for employment based on actual or perceived sexual orientation.

Despite the conscientious objection of each of the petitioners to one or more of these measures, however, it was "impractical (and nearly impossible) for any of them, in this state of 32 million people, to disassociate themselves in the public mind from State Bar support for these positions." (App. 23a.) Accordingly, petitioners are, through the

propaganda efforts of the State Bar in support of these ideological positions, unavoidably linked to them. Underscoring petitioners' position, California Governor Pete Wilson vetoed respondent State Bar's dues bill during the pendency of their case. (App. 26a-30a.) In his veto message[2] the Governor stated that a principal reason motivating his decision was the political activities of the State Bar unrelated to regulation of the profession, which were demonstrated when the State Bar "conducted its annual convention in San Diego where delegates promptly got down to business and adopted resolutions:

- in favor of legalizing same sex marriages
- to prohibit discrimination against transvestites and transsexuals
- to reduce penalties for drug dealers
- to reduce penalties for repeat child molesters
- to thwart the will of the voters relative to affirmative action at state law schools."

---

[2] Message of Governor Pete Wilson, October 11, 1997 on veto of Senate Bill 1145, which would have authorized the State Bar to collect annual bar dues from its members for the years 1998 and 1999. (App. 26a-30a.) The Legislature did not pass a new State Bar dues bill during its 1997-98 biennial session. Ultimately the state supreme court stepped in to impose a regulatory fee upon attorneys for the purpose of supporting an attorney discipline system. (*In re Attorney Discipline System*, 19 Cal. 4th 582 (1998).) During the first half of the 1999-2000 Legislative session, a new State Bar dues bill was enacted which reaffirmed the compulsory nature of the Bar and left its ability to lobby on political issues uncabined and unconfined.

Petitioners made clear that the pro-rata refund of that portion of their bar dues used for political expression pursuant to *Keller v. State Bar of California*, *supra*, 496 U.S. 1, did not obviate the violation of their rights to associational freedom. The gravamen of their grievance is *not*, in contrast to the labor union cases from which the remedy in *Keller* was fashioned, that they are *nonmembers* complaining about the use of their money for improper activities. It is rather that they are conscripted *members* of respondent and cannot disassociate themselves from it without foregoing their professional livelihoods. They demand that, as long as they are required to be members of this organization, it stop taking political and ideological positions not germane to the regulation of the legal profession.

B. Proceedings Below

Respondent State Bar moved to dismiss petitioners' complaint on the grounds that they did not present a valid First Amendment claim. The district court agreed with respondent, stating that "it is well accepted that a state may constitutionally require lawyers to be members of the state bar," and cited to *Lathrop*, *supra*, 367 U.S. at 843, and *Keller*, *supra*, 496 U.S. 1 as controlling authority for this position. Acknowledging that "First Amendment rights are implicated whenever a person is forced to make or support an expressive act," the district court nonetheless found that petitioners' allegations did not establish the "requisite connection between the requirements of . . . State Bar

membership and the State Bar's speech to state a First Amendment claim."

The court of appeals affirmed, stating that in its view "*Keller* reaffirmed *Lathrop*'s holding that lawyers admitted to practice in the State may be required to join and pay dues to the State Bar." It then went on to say that the claim reserved by this Court in *Keller*,

> was a *broader* claim of violation of associational rights than was at issue in either *Lathrop* or in this case. Here, plaintiffs do not allege that they are compelled to associate in any way with the California State Bar's political activities. They do not allege that the Bar's political involvement is greater and the regulatory function less than it was when the Court decided *Keller* and *Lathrop*. The claim they make is therefore no broader than in *Lathrop*, where the Court held the regulatory function of the bar justified compelled membership. *Lathrop* controls our decision here. (App. 9a, italics added.)

REASONS FOR GRANTING THE PETITION

The issue presented by petitioners is the same one this Court declined to reach in *Keller* and *Lathrop*—whether an attorney can be compelled to belong to an association that engages in political or ideological activities beyond those

germane to the regulation of the legal profession. Yet the appellate court opinion misinterprets *Keller* and *Lathrop* as having already decided this issue against petitioners. In providing this new gloss to *Keller* and *Lathrop*, the Court of Appeals' opinion not only ignores this Court's holdings and reasoning in both opinions, but misapplies long standing principles of First Amendment jurisprudence. The decision below is, therefore, erroneous as a matter of law and should be reversed.

The issue presented is also of continuing importance as shown by this Court's consideration of a related question argued this term in *Board of Regents of the University of Wisconsin v. Southworth*, No. 98-1189—*viz.*, can students, consistent with the First Amendment's guarantee to freedom of expression and association, be forced to pay a student fee that is used to fund private political and ideological organizations expressing viewpoints with which they fundamentally disagree? *Southworth* pits the First Amendment right of one not to be compelled to associate with others and by that association be unavoidably linked with viewpoints they find anathema, against the countervailing right of a university and its student body to create a forum for the expression of diverse points of view. Many of the principal opinions of this Court that form the bases for the arguments by the parties and their supporting amici in *Southworth* are the same opinions upon which the Court of Appeals' opinion and the parties herein rely to argue their positions.

Petitioners, though, present an even stronger First Amendment claim than that of the complaining students in *Southworth* because the State Bar, in contrast to the university in *Southworth*, cannot claim as its purpose the creation of a forum for the expression of diverse points of view. *Au contraire*, the State Bar uses the full weight of the association to promote only one particular viewpoint. This case, then, is an appropriate one for the Court to grant certiorari on and hold until a decision is reached in *Southworth* that may provide additional clarity and guidance on the question presented. (*See, e.g.*, *Keney v. New York*, 388 U.S. 440 (1967).)

I. The Court of Appeals' Opinion Mistakenly Interprets *Lathrop* and *Keller* as Holding that An Attorney Can be Constitutionally Compelled to Belong to an Association that Takes Political Positions on Issues Not Germane to the Legal Profession.

A. *Keller*, Contrary to the Opinion of the Court of Appeals, Declined to Reach the Issue Presented by this Petition.

The conflict between what this Court actually stated in *Lathrop* and *Keller*, and what the Court of Appeals incorrectly attributes to it, requires correction. In *Keller*, the Court expressly declined to address the issue the appellate opinion mistakenly claims it did address. Specifically, in language the appellate opinion quotes, Chief Justice Rehnquist stated for

the Court that "[P]etitioners challenge not only their compelled financial support of group activities, but urge that they cannot be compelled to associate with an organization that engages in political or ideological activities beyond those for which mandatory financial support is justified under the principles of *Lathrop* [*v. Donohue, supra*, 367 U.S. 820] and *Abood* [*v. Detroit Board of Education*, 431 U.S. 209 (1977)]. *The California courts did not address this claim, and we decline to do so in the first instance.*" (*Keller, supra*, 496 at 17, italics added.)

How the appellate court can read this Court's plain "decline to address" position in *Keller* as in fact doing just the opposite and addressing that identical issue by reaffirming "*Lathrop* on th[e] very point" raised by petitioners in this case, is an enigma. The Court of Appeals' opinion attempts to justify its inaccurate conclusion by distinguishing the issue that *Keller* eschewed from the issue presented by petitioners. It states that the claim "reserved in *Keller* was a *broader* claim of violation of associational rights than was at issue in either *Lathrop* or in this case." (App. 9a, italics added.) But in what sense, if any, the issue "reserved in *Keller*" was "broader" than the issue presented by petitioners is not explained.[3] Since petitioners deliberately sought to assert

---

[3] If by "*broader*" the Court of Appeals meant that *Keller* raised the question about the constitutionality of compelled membership in an association that takes political positions offensive to those being compelled to belong and not germane to regulation of the profession—which is the sole issue presented herein—*and* that it raised the related question of the legality of funding for

their rights to the issue left unaddressed in *Keller*, and drafted their complaint to accomplish that goal, it is difficult to figure out how the issue reserved in *Keller* could be any different from the one presented herein.

The appellate opinion implies that there are two distinctions between *Keller* and this case that may limn its curious notion of issue breadth: first, petitioners here, presumably in contrast to the petitioners in *Keller*, "do not allege that they are compelled to associate in any way with the California State Bar's political activities;" and, second, "[t]hey do not allege that the Bar's political involvement is greater and the regulatory function less than it was when the Court decided *Keller* and *Lathrop*." (*Id.*)

But the appellate opinion is wrong about the first point, and the second is irrelevant since neither *Keller* nor

---

viewpoints expressed by that association offensive to members forced to make contributions to it, that is correct but a *non sequitur*. *Keller* decided the latter question but reserved any decision on the former, which brings petitioners herein back to the Court for its resolution now. "Unless integrated bars voluntarily abandon such ineffective remedies [*e.g.*, the *pro rata* deduction from fees used for political or ideological speech] in favor of more meaningful spending limitations, or until the Supreme Court revisits the issue and replaces *Keller* with a clearer, more narrow standard, lawyers in states with integrated bars will continue to face the threat of state-compelled support for political agendas they oppose." (James B. Lake, *Lawyers, Please Check Your First Amendment Rights at the Bar: the Problem of State-Mandated Bar Dues and Compelled Speech*, 50 *WASH. & LEE L. REV.* 1833, 1850-1851 (1993).)

Lathrop decided the issue presented. Petitioners *do* complain, in the first place, as did the petitioners in *Keller*, that they *are* compelled to associate with the State Bar's political activities. That, in fact, is the essence of their complaint and they state it unequivocally:

> The State Bar's involvement in ideological and political matters is done with full knowledge that large parts of the membership of the State Bar disagree with those positions and often hold a position contrary to that which is announced as the position of the State Bar. The State Bar, however, purports to speak for the entire membership, including those who, like [petitioners], disagree with various ideological and political positions adopted by [respondent] and who . . . are not free to disassociate themselves from the State Bar without abandoning their profession and livelihood. (App. 21a-22a.)

Now, it may well be that the Court of Appeals does not feel that petitioners' objection to compulsory membership in respondent State Bar rises to a level deserving of constitutional protection. That perhaps accounts for why the court thinks it significant that the State Bar does not restrict petitioners' "ability to express their own views or to disagree with the positions of the Bar; [nor] do [petitioners] contend that membership compels them to express any particular ideas or make any particular utterances of any kind." (App. 3a.)

But this piling on of burdens beyond those petitioners allege, implies that they must demonstrate these authoritarian excesses in order to obtain protection for their First Amendment rights; that they have no First Amendment claim based on compelled membership in an organization that causes the public to identify them with political positions they abhor. *Keller*, however, does not take that position, and the appellate opinion's claim that these additional burdens are required by *Keller* ignores its express holding to the contrary.[4]

B. *Lathrop* Did Not, Contrary to the Opinion of the Court of Appeals, Decide the Issue Presented by this Petition; but Analysis of the Views Expressed in *Lathrop* in the Context of Later First Amendment Developments Supports Petitioners' Position.

Petitioners concede that they have not alleged that the "Bar's political involvement is greater and the regulatory function less than it was when the Court decided *Keller* and *Lathrop*," something the Court of Appeals apparently (and

---

[4] Petitioners are not, of course, alone in their reading of this Court's opinions as *not* deciding the issue they present herein. "Despite several opportunities to address whether a bar member's First Amendment rights are violated if the association takes a political or ideological position with which the member disagrees, the Supreme Court has never done so." (Ralph Brock, *Giving Texas Lawyers Their Dues: The State Bar's Liability Under Hudson and Keller for Political and Ideological Activities*, 28 ST. MARY'S L.J. 47, 103, fn. 283 (1996)(internal citations omitted).)

mistakenly) feels is required to state a cognizable constitutional claim.[5] That allegation may be pertinent if either *Keller* or *Lathrop* held that the level of political involvement versus regulatory activity evidenced in either case was inadequate to raise the constitutional issue of associational and expressive freedom, but neither opinion so holds. *Keller*, as already shown, declined to address the issue. *Lathrop* muddied the waters surrounding it but left one rivulet crystal clear—it was not deciding the constitutional issue presented.[6] The plurality opinion by Justice Brennan expressly states that "we would not be justified in passing on the constitutional question considered below," and "[W]e therefore intimate no view as to the correctness of the conclusion . . . that the appellant may constitutionally be

---

[5] A comparison of the political activity and speech engaged in by the Bar that was at issue in *Keller*, *e.g.*, support for gun control laws, a nuclear weapons freeze, and a resolution asking Congress to refrain from enacting an alien guest-worker program, and that is objected to by petitioners in this case shows that not much has changed since *Keller*.

[6] "The *Lathrop* Court . . . did not determine what restraints, if any, the First Amendment Free Speech Clause imposes upon integrated bars." (Lake, *supra*, 50 *WASH. & LEE L. REV.* at 1839-1840. See also Edward A. Tomlinson, *Bar Unification—A Caveat*, 26 *MD. L. REV.* 240, 244-245 (1966).) "[A]s the record did not reveal any particular political or legislative activities which Lathrop alleged violated his rights, the plurality reserved the question . . . [of whether] certain political and legislative [activities] of such an organization might violate First Amendment rights of free speech." (Bradley A. Smith, *The Limits of Compulsory Professionalism: How the Unified Bar Harms the Legal Profession*, 22 *FLA. ST. UNIV. L. REV.* 35, 43 (1994).)

compelled to contribute his financial support to political activities which he opposes." (367 U.S. at 847-848 (plurality opinion).)

Not only does *Lathrop* contain *no* holding, it is one of the few cases in which the Court has *held* that there is no holding. "*Lathrop does not provide a clear holding to guide us in adjudicating the constitutional questions here presented.*" (*Abood v. Detroit Board of Education, supra*, 431 U.S. at 233, fn. 29 (italics added).)

Analyzing *Lathrop* in the context of evolving First Amendment jurisprudence applied since that decision, however, strongly favors petitioners. *Lathrop* was a four member plurality opinion which concluded that *no* constitutional issue had been properly raised. The five remaining justices held conflicting views on the subject. Of the five members who concluded that the constitutional question had been properly raised, three, Justices Whittaker, Harlan and Frankfurter, were of the opinion that there could be no constitutional objections to Wisconsin's integrated (i.e., mandatory) bar. In reaching that conclusion, Justice Whittaker relied upon the now totally repudiated "right-privilege" distinction (i.e., since being a lawyer is a privilege, and not a right, no constitutional question is involved), also known as the doctrine of "unconstitutional conditions." (See, e.g., *Sugarman v. Dougall*, 413 U.S. 634, 644 (1973); *Perry v. Snidermann*, 408 U.S. 593, 597 (1972) and authorities therein collected; and William Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81

HARV. L. REV. 1439 (1968).) Justices Harlan and Frankfurter based their conclusion that compelled membership in the Wisconsin bar did not violate the First Amendment by "balancing" the state's interest in an integrated bar against *Lathrop*'s right to freedom of association, and found the state's interest stronger. This balancing test for constitutional rights met its demise in *Bandenburg v. Ohio*, 395 U.S. 444 (1969).

Two members of the Court, Justices Black and Douglas, thought otherwise and expressed the opinion that the sort of arrangement which currently obtains in California violates the First Amendment. The doctrine upon which Justices Black and Douglas relied is the doctrine vindicated in *Bandenburg v. Ohio*, *supra,* that remains viable for current First Amendment analysis.

Justice Black's explanation of how the Harlan-Frankfurter "balancing" approach whittles away the First Amendment interests of the individual to "nothingness" is instructive.[7]

---

[7] "The interest of the State in having 'public expression of the views of a majority of the lawyers' by compelling dissenters to pay money against their will to advocate views they detest is magnified to the point where it assumes overpowering proportions and appears to become almost as necessary a part of the fabric of our society as the need for 'self-preservation.' On the other side of the 'scales,' the interest of lawyers in being free from such state compulsion is first fragmentized into abstract, imaginary parts, then minimized part by part almost to the point of extinction, and finally characterized as being of a purely 'chimerical nature.' As is too

Given the prescient views of Justices Douglas and Black on the direction of this Court's evolving First Amendment doctrine, the constitutional issue raised but not decided in *Lathrop* or *Keller*, invites decision now.

II. Compulsory Membership in the California State Bar, an Organization that Regularly Asserts Political Positions on Matters Not Germane to the Regulation of the Legal Profession, Infringes Petitioners' First Amendment Rights and Cannot be Justified By Any Compelling State Interest.

A. Conscripted Membership In Any Organization Infringes First Amendment Rights.

The applicable doctrine is clear and settled: The "First Amendment protects political associations as well as political expression." (*Buckley v. Valeo*, 424 U.S. 1, 199 (1976).) This protected freedom of association "plainly presupposes a freedom not to associate." (*Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984).) Moreover,

---

often the case, when cherished freedoms of the First Amendment emerge from this process, they are too weightless to have any substantial effect upon the constitutional scales and must therefore be sacrificed in order not to disturb what are conceived to be the more important interests of society." (*Lathrop v. Donohue*, *supra*, 367 U.S. at 872 (Black, J., dissenting).)

freedom of speech also plainly presupposes a freedom not to say that which one does not believe. (*Wooley v. Maynard*, 430 U.S. 705 (1977) (requiring individual to display motto, "Live Free or Die," on license plate violated right to refrain from speaking.)) "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." (*West Virginia Bd. Of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (holding unconstitutional state school board's resolution requiring students as a condition of attending public school to participate in pledge of allegiance to United States flag).)

The collective bargaining cases, from which was derived the rule in *Keller* permitting members of the State Bar to withhold that portion of their dues used for political purposes, do not suspend these rules of fundamental liberty. On the contrary, "by allowing the union shop at all, we have already countenanced a significant infringement of First Amendment rights." (*Ellis v. Brotherhood of Railway Clerks*, 466 U.S. 435, 455-456 (1984).) "The First Amendment surely requires that the restriction [on protected association or speech] be demonstrably supported by not only a legitimate state interest, but a *compelling* one, and that the restriction operates without unnecessarily circumscribing protected expression." (*Brown v. Hartlage*, 456 U.S. 45, 53-54 (1982)(italics added)(prohibiting state from attempting to prevent a candidate for county commissioner from making promises that would benefit a particular class of voters).)

Only by demonstrating a *compelling* interest, then, can the state justify an infringement on an individual's right to freedom of association and opinion. In the labor union context, the compelling interest is "labor peace," which requires that there be but one exclusive bargaining agent and that even employees opposed to the union be required to financially support activities germane to collective bargaining. No one is required, however, to join a union; only to financially support its activities that are germane to collective bargaining from which the nonmembers also benefit. The State Bar, in contrast, conscripts its members as a condition of them being permitted to practice their professions,[8] and serves no comparable role to that of a union in terms of providing for "labor peace."[9]

---

[8] "Though states routinely license a wide variety of occupations and professions, and often require the payment of an annual licensing fee by those practicing within the profession, forced membership in an association is unknown outside the bar. Doctors are not required to join the medical society, nor dentists the dental association. Certified public accountants, veterinarians, and architects are free to join, or refrain from joining, their respective professional organizations. The same is true with other licensed professions and occupations." (Smith, *supra*, 22 *FLA. ST. UNIV. L. REV.* at 36 (1994).)

[9] "[A]s the *Keller* opinion acknowledged, bar association activities do not benefit lawyers as directly as union programs benefit employees . . . [A] bar does not negotiate with clients on behalf of its members, as would a collective bargaining unit. Certainly a bar's purposes are unlike the reason for which Congress established collective bargaining: to preserve industrial peace." (Lake, *supra*, 50 *WASH. & LEE L. REV.* at 1847.)

The appellate court apparently believes that petitioners' First Amendment freedoms are not violated by conscription into the State Bar because their membership in it does not compel "them to express any particular ideas or make any particular utterances of any kind." (App. 3a.) But the point of petitioners' claim is that they cannot disaffirm the State Bar's political statements by the emphatic means used by all free people: they are not free to disassociate themselves from those who, on their purported behalf, utter that which they abhor. Petitioners are *forced*, as a condition of practicing their profession and earning their livelihood, to be members of respondent and are thus *forced* to be associated with respondent Bar's speech. "[I]t is reasonable to associate an organization's views with a dues paying member of that organization." (Lake, *supra*, 50 *WASH. & LEE L. REV.* at 1847.) There is no way out. If "nonmembers have an absolute right not to support speech they disagree with" (*Grunwald v. San Bernardino City Unified School District*, 994 F.2d 1370, 1373 (9th Cir. 1993), *cert. denied*, 510 U.S. 964 (1993)), what can be said of the rights of conscripted *members*?

Even if petitioners could somehow disassociate themselves from respondent, the *need* to disassociate would in itself impinge on their rights of expression. (*PG & E v. Public Util. Comm'n*, 475 U.S. 1, 15-16 (1986)(plurality opinion).) But disassociation from an organization they are compelled to join is neither logically nor contingently possible:

> [¶] Because of the state's compulsion [that all lawyers belong to the State Bar], dissenting lawyers must suffer reputational harm or must speak out to prevent such harm. Either way, such lawyers have effectively lost control over how to present themselves to the world. (Lake, *supra*, 50 *WASH. & LEE L. REV.* at 1859.)

The appellate opinion's contention that petitioner's freedom of association is not violated by conscription into the State Bar because they remain free to "express their own views or to disagree with the positions of the Bar," (App. 3a) misses the point.

> No one would seriously suggest that if lawyers were forced to join the Ku Klux Klan as a condition of practice, their concerns about forced association would be insignificant because they could individually dissent from Klan positions. Conceding that state bar associations are less odious to most people than the Ku Klux Klan does not eliminate the sense of invasion felt by these lawyers who would prefer not to link themselves to their state bar association. (Smith, *supra*, 22 *FLA. ST. UNIV. L. REV.* at 71.)

Finally, regardless of whether others actually associate the Bar's speech with any particular lawyer, compelling an

attorney to belong to an association that speaks for its membership on political matters unrelated to the regulation of the profession violates the freedom of conscience of those attorneys who embrace contrary views. (*Wooley v. Maynard*, *supra*, 430 U.S. 705; and *West Virginia Bd. of Education v. Barnette*, *supra*, 319 U.S. 624.) *Wooley* held that a state statute requiring car owners to carry the state's motto—"Live Free or Die"—on their car license plates unconstitutionally compelled speech, even though it seems unlikely that others would regard a particular car owner's compliance with the state's demand as affirmation of the state's motto. In the same vein, *Barnette* holds that a school board resolution requiring students to stand for the pledge of allegiance unconstitutionally compels speech, even though it seems unlikely that others would regard a particular student's compliance with the state's demand as affirmation of the state's beliefs.

In neither *Wooley* nor *Barnette* did the Court's decision turn on what the appellate opinion in this case relied upon to deny petitioners' their First Amendment rights: how *others* assess the individual's action and whether they link it to particular expressed viewpoints. The crucial inquiry in both cases was whether the *individual* reasonably might regard compliance with the state's command as affirmation of some belief that the individual opposed.

Petitioners, then, trace the bar's speech to themselves. No matter how others interpret petitioners' actions in belonging to the State Bar, the requirement that they belong

to an organization that speaks for them on political matters in ways they feel are anathema to their consciences, violates their First Amendment rights.

An infringement on the right to associate or not for expressive purposes, may only "be justified by [means] adopted to serve *compelling* state interests, unrelated to the suppression of ideas, that cannot be achieved through means *significantly less restrictive* of associational freedoms." (*Roberts v. United States Jaycees, supra*, 468 U.S. 623 (italics added); see also *Bates v. Little Rock*, 361 U.S. 516, 524 (1960); and *Sherbert v. Verner*, 374 U.S. 398, 406-09 (1963)(finding no compelling state interest enforced in eligibility provisions of unemployment compensation law that justified infringement of right to religious freedom).) Squarely on point is *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), where a procedure for apportioning contributions by nonmembers of a labor union was found wanting because it did not satisfy the compelling interest test. It was not "carefully tailored to minimize the infringement" (475 U.S. at 302), thus violating the rule that "precision of regulation must be the touchstone." (475 U.S. 303, fn. 11, quoting from *NAACP v. Button*, 371 U.S. 415, 438 (1963).)

Because *Hudson* and other union cases have been less concerned with coerced membership than with the use of coerced assessments from nonmembers, the compelling interest test itself is rarely reiterated. Instead, the Court has reviewed the apportionment of particular assessments to insure that nonmember (i.e., involuntary) assessments satisfy

the "less restrictive means" corollary of the compelling interest test. In doing this the Court has emphasized the "germaneness" of the activities to the legitimate collective bargaining functions of unions.

It is the point of petitioners, however, that compulsory State Bar membership infringes their First Amendment rights and cannot be justified by any compelling interest whatsoever; and, even if it could, it is done without the precision of regulation that requires the Bar's speech on behalf of the membership to be germane to the regulation of the profession. Neither the Court of Appeals' opinion nor that of the district court identified any compelling interest of the State that would justify coerced membership in the State Bar. The absence of any compelling interest renders the scheme of mandatory membership void no matter the means used to accomplish it; and when, as here, those means are so broad as to involve the State Bar in the expression of viewpoints that have nothing to do with the regulation of the profession or the improvement of the quality of legal services, compelled membership must cease.

B. The Proliferation of Voluntary Bar Associations Demonstrates That Compulsory Bar Membership is Unnecessary to Any Compelling State Interest; and that the Expression by the State Bar of Political Positions Not Germane to Regulation of the Legal Profession Runs Afoul of the "Precision of Regulation" Requirement.

The compelling interest doctrine was not discussed in *Lathrop*. It was not relevant to the debate between Justices Harlan and Black, and Justice Brennan denied he was announcing any constitutional doctrine.[10] To the extent Justice Brennan identified any interest advanced by compulsory membership, it was the need to have a body informing the legislature on matters important to the legal community, matters about which there was "substantial unanimity" among bar members. (367 U.S. at 834.) Those matters identified by Justice Brennan's plurality opinion as garnering "substantial unanimity" from bar members included an increase in salaries for state supreme court justices and the extension of personal jurisdiction over non-residents, quite different issues from those to which petitioners herein object.

---

[10] Though the compelling interest test has its genesis in *Schneider v. State*, 308 U.S. 147 (1939) (invalidating an overbroad anti-handbill ordinance), it was not until the 1960s that the doctrine was fully developed and generally applied in First Amendment jurisprudence. (See Note, *Less Drastic Means and the First Amendment*, 78 *YALE L. J.* 464 (1969).)

In 1961 when *Lathrop* was decided the claim that the administration of justice needed a quasi-official body to inform the legislature about matters that attracted little interest beyond the legal community was perhaps tenable, though the need for compulsory membership was not explained and was, indeed, unnecessary to the plurality decision once it concluded that no constitutional issue was properly presented. But for at least the past third century in California and other states, a number of voluntary bar associations have emerged that are more than willing to provide legislatures with their thoughts on matters pertinent to the legal community.[11] Additionally, there seems no reason to believe that the State Bar will atrophy if it cannot conscript members. Approximately twenty states—40% of the union—have voluntary bar associations[12] instead of "integrated" or "unified" bars.[13]

---

[11] To illustrate, the current *DIRECTORY OF LOBBYISTS, LOBBYING FIRMS, AND LOBBYIST EMPLOYERS* (California Secretary of State, 1999) published by the California Secretary of State, lists under the category "legal" twenty-nine entities ranging from the Association for California Tort Reform (now the Civil Justice Association for California) to the Workers' Compensation Defense Attorneys Association.

[12] Lake, *supra*, 50 *WASH. & LEE L. REV.* at 1837, fn. 38.

[13] "Since 1927, California has maintained an 'integrated' or 'unified' bar, that is, a state bar fused with the state bar association. The term 'state bar' refers collectively to all those licensed to practice law in a state. By contrast, the term 'bar association' refers to an organization of lawyers. Unification fuses the bar with the bar association, and thus makes membership in the state bar's association mandatory for lawyers." (David Luban, *The*

> [T]he large majority of lawyers in voluntary states belong to either their state association, a local association, or the American Bar Association. All attorneys are subject to the general disciplinary authority of the courts. * * * Ohio, Indiana, Minnesota, New York or Illinois lawyers would hardly take seriously the assertion that they are less professional because their states lack mandatory bar associations. Similarly, it is doubtful that many Michigan, Florida, or California lawyers, including those in favor of a unified bar, would feel that their own level of professionalism would be diminished if they could no longer coerce their colleagues into the association. (Smith, *supra*, 22 *FLA. ST. UNIV. L. REV.* AT 67.)

The experience of the American Bar Association (ABA), moreover, demonstrates that a voluntary bar can survive quite nicely, even when it takes controversial positions that result in the resignation of members. The ABA thrived even though Chief Justice Warren resigned from it.[14]

Disengagement of the Legal Profession: Keller v. State Bar of California, 5 *THE SUPREME COURT REV.* 163, 167 (1990).)

[14] "In 1959, Chief Justice Earl Warren resigned from the American Bar Association to protest the ABA's repeated allegations that the . . . Court had become too liberal. But now the ABA itself is drawing similar fire, as its outspoken stands on certain legal and

Thus the only legitimate state interest ever advanced as a reason for an involuntary state bar association–regulation of the profession and improvement in the quality of legal services—does not, in truth, justify anything other than a voluntary bar; and the profusion of voluntary bars over the past thirty years fortifies the conclusion that conscription can find no compelling justification. Petitioners nevertheless find themselves conscripted by a State Bar that speaks for them politically even though they have political convictions contradictory to those expressed by the Bar.

III. Certiorari Should be Granted Because the Question Presented Herein is Similar to that Presented in *Board of Regents of the University of Wisconsin v. Southworth*.

The Court has before it a related question on First Amendment associational freedom, *Board of Regents of the University of Wisconsin v. Southworth*, No. 98-1189. The issue in that case is whether the mandatory student activity fee collected from public university students and then disbursed to a variety of student groups of different political persuasions, violates the First Amendment rights of the students who disagree with the messages expressed by the funded groups. Petitioners therein contend that the fee is a compelled subsidy of speech itself and violates associational

---

social issues have earned it a growing reputation as a liberal organization." (Deborah Graham, *ABA's Increased Politicization, "Liberalism" Draw Fire, Praise*, AMERICAN LAWYER, August 9, 1982, p.25.)

freedom; defenders of the practice characterize it as a compelled subsidy of a neutral forum for speech sanctioned by *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995). (*Southworth v. Grebe*, 151 F.3d 717 (7th Cir. 1998).)

However this Court decides *Southworth*, its opinion will likely impact the analysis applicable to resolve the compelled bar association membership issue raised by petitioners herein. To begin with, both the appellate opinion in *Southworth* and the briefs of the parties and amici filed with this Court in that case bristle with references to *Keller* and other authorities cited and relied upon by the parties to this dispute and by the appellate court's opinion in this case. To the extent the Court provides additional instruction on the scope and application of *Keller* and other opinions pertinent to resolution of the controversy in *Southworth*, it will likely be helpful in answering the question presented here.

More importantly, the associational freedom issue that is common to both cases is stronger in this one. In *Southworth* the Court determined whether the mandatory student fee is "germane" to a legitimate government interest by asking two questions: first, whether there is some otherwise legitimate governmental interest justifying any compelled funding; and then, whether the specifically challenged expenditure is germane to that interest. But in *Southworth* that first issue was decided in favor of the state, as the students did "not contend that the Regents lack a legitimate interest in the compelled funding of the student

government or student organizations." (151 F.3d at 724.) In this case, however, petitioners contend that the state can demonstrate no compelling interest for required membership in the State Bar.

Finally, the notion of "germaneness," which is pivotal to the resolution of both cases, will likely be fleshed out in *Southworth* and provide guidance herein. (*Id.*)

For all the aforementioned reasons, this case is an appropriate one for the Court to grant certiorari on and hold until a decision is reached in *Southworth* on the First Amendment issue similar to that raised by petitioners herein.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/_____

Fred J. Hiestand*
1121 L Street, Suite 404
Sacramento, CA 95814
(916) 448-5100

Paul N. Halvonik
2600 10th Street, Suite 511
Berkeley CA 94710
(510) 486-8200
Counsel for Petitioners
*Counsel of Record

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed September 2, 1999]

No. 97-17008
D.C. No. CV-97-01115-GEB

BILL MORROW; BARRY KEENE; BRUCE HENDERSON, *Plaintiffs-Appellants,*	)
v.	)
THE STATE BAR OF CALIFORNIA, a public corporation; MEL ASSAGAI, *Defendants-Appellees.*	)

OPINION

Argued and Submitted
February 10, 1999--San Francisco, California

Appeal from the United States District Court
for the Eastern District of California
Garland E. Burrell, District Judge, Presiding

Before: Mary M. Schroeder, Ferdinand F. Fernandez, and Barry G. Silverman, Circuit Judges.

Opinion by Judge Schroeder

SUMMARY

Individual Rights/Freedom of Speech

The court of appeals affirmed a judgment of the district court. The court held that state bar members' First Amendment rights are not violated by their compulsory membership in a state bar association that conducts political activities beyond those for which mandatory financial support is justified.

California maintains a unified bar. In a unified bar, regulatory functions are combined with non-regulatory activities in a single organization in which membership is mandatory.

Appellee members of the State Bar of California objected to political positions taken by the Bar, contending that their freedom of association rights under the First Amendment were violated by their being forced to belong to an organization that publicly espouses views with which they disagreed. The members filed suit in district court, seeking to enjoin the political activities of the Bar that were not germane to its regulatory functions. The district court dismissed the complaint on the ground that the Supreme Court has upheld mandatory bar membership, so long as members are not compelled to contribute to political activities.

The members appealed.

[1] The Supreme Court has twice visited the question of bar membership. [2] In 1961, the Supreme Court held that it was constitutional to compel attorneys to contribute dues to a unified bar that conducts political activities. [3] The Supreme Court addressed the question of whether the use of mandatory dues to support political or ideological activities by a state Bar would violate a member's First Amendment rights in 1990. In that case, the court held that the California State Bar could not use mandatory dues to fund activities of an ideological nature that were not germane to regulating the legal profession and improving the quality of legal services. [4] The court reaffirmed its earlier holding that lawyers admitted to practice in the State may be required to join and pay dues to the State Bar.

[5] The members did not contend that mandatory bar membership restricted, directly or indirectly, their ability to express their own views or to disagree with the positions of the Bar. Nor did they contend that membership compelled them to express any particular ideas or make any particular utterances of any kind. None of the members' property, i.e. their dues, was being used to espouse views with which they disagreed.

OPINION

SCHROEDER, Circuit Judge:

Plaintiffs are members of the State Bar of California who object to political positions taken by the Bar. They contend that their freedom of association rights under the First Amendment are violated by their being forced to belong to an

organization that publicly espouses views with which they disagree. Plaintiffs seek to enjoin the political activities of the Bar that are not germane to its regulatory functions, even though plaintiffs are not required to finance these political activities with their dues. The district court dismissed the complaint on the ground that the Supreme Court has upheld mandatory bar membership so long as members are not compelled to contribute to political activities. *See Keller v. State Bar of California,* 496 U.S. 1 (1990); *Lathrop v. Donohue,* 367 U.S. 820 (1961). Plaintiffs appeal and we affirm.

BACKGROUND

Plaintiffs are several current and former California public officials who belong to the State Bar of California. Plaintiff Bill Morrow represents California's 73rd assembly district; Barry Keene is a former state senator; and J. Bruce Henderson is a former member of the San Diego City Council. Defendants are the State Bar and Mel Assagai, a former executive officer of the State Bar who in 1996 was given a two-year contract as a lobbyist for the State Bar.

California maintains a unified bar. In a unified bar, regulatory functions (such as admission, continuing education, and attorney discipline) are combined with non-regulatory activities (such as arranging social functions, obtaining rental car discounts for members, and political lobbying) in a single organization in which membership is mandatory. More than half of the states have unified bars.

Plaintiffs disapprove of the California State Bar's political activities in support of four 1997 California bills.

The bills would have raised the ceiling on pain and suffering damages in medical negligence cases, prohibited civil compromises in domestic violence cases, defined a state claim for a hostile work environment, and permitted state law claims for discrimination on the basis of sexual orientation.

Plaintiffs do not complain about how the State Bar spends their mandatory dues. In compliance with the Supreme Court's decision in *Keller,* the State Bar allows members to seek a refund of the proportion of their dues that the State Bar has spent on political activities unrelated to its regulatory function. *See id.*, 496 U.S. at 7. Rather, plaintiffs complain that by virtue of their mandatory State Bar membership, they are associated in the public eye with viewpoints they do not in fact hold. This they contend violates their First Amendment rights to free association.

The district court dismissed the complaint for failure to state a claim. It ruled on the basis of the Supreme Court's decision in *Lathrop,* which upheld mandatory state bar membership in the face of similar objections. *See id.* The district court noted that plaintiffs are not compelled to endorse or financially support any position of the Bar. They are free to disagree publicly with the State Bar's political stances. The court also noted that in light of the huge size of the California Bar, the political positions of the Bar are unlikely to be attributed to all its individual members.

The plaintiffs appeal, contending the district court erred as a matter of law. We review de novo. *See Stone v. Travelers Corp.*, 58 F.3d 434, 436-37 (9th Cir. 1995).

DISCUSSION

[1] The issue is whether plaintiffs' First Amendment rights are violated by their compulsory membership in a state bar association that conducts political activities beyond those for which mandatory financial support is justified. The Supreme Court has twice visited the question of bar membership.

[2] In *Lathrop,* 367 U.S. 820 (1961), the Supreme Court held it constitutional to compel attorneys to contribute dues to a unified bar that conducts political activities. Lathrop, a Wisconsin attorney, sought a refund of his mandatory bar dues. He argued that he could not be compelled to join and support an organization that lobbied the legislature. *See id.* at 822 & 828. The Wisconsin Supreme Court held that compelled bar membership did not violate his rights of freedom of association or free speech. *See id.* at 823. The Supreme Court affirmed without a majority opinion. A majority of the Justices, however, agreed that mandatory paid membership in the bar did not violate freedom of association. Four of the six votes reaching that conclusion were expressed in the plurality opinion of Chief Justice Warren and Justices Brennan, Clark, and Stewart. In their view, given that the only action Lathrop was compelled to take was the payment of dues, and, further, that the bulk of the State Bar's activities were non-political, there was no impingement on Lathrop's right of free association. *See id.* at 843. The other two votes came from Justices Harlan and Frankfurter, who stated unequivocally in their concurrence that "a State may Constitutionally condition the right to practice law upon membership in an integrated bar association." *Id.* at 849.

[3] A majority of the Court in *Lathrop* was unable to agree on whether the use of mandatory dues to support political or ideological activities by the Wisconsin Bar would violate Lathrop's First Amendment rights. *See id.* at 844. The Supreme Court addressed this question in *Keller v. State Bar of California,* 496 U.S. 1 (1990). It held that the California State Bar could not use mandatory dues to fund "activities of an ideological nature" that were not germane to "regulating the legal profession and improving the quality of legal legal profession and improving the quality of legal services." *Id.* at 16. The Court reasoned that compelling contributions to an organization for political purposes violated free speech just as much as prohibiting contributions to political organizations. *See id.* at 9-10.

The Court drew its distinction between regulatory and ideological activities from a line of labor union cases. The most important of those cases, *Abood v. Detroit Bd. of Ed.,* 431 U.S. 209 (1977), held that Michigan could compel state employees who did not belong to the employees union to contribute money to the union only to the extent the money was spent on "collective bargaining, contract administration, and grievance-adjustment purposes." *Id.* at 232. Mandatory contributions could not be spent on "political and ideological purposes unrelated to collective bargaining." *Id.; see also Ellis v. Brotherhood of Ry. Airline and S.S. Clerks,* 466 U.S. 435 (1984).

[4] Plaintiffs stress that the Court recognized in *Ellis* that mandatory assessments by a labor union constitute a significant intrusion on First Amendment rights that can be justified only by compelling state interests. Plaintiffs contend no such interests justify mandatory bar memberships. The

difficulty with this argument is that the Court decided *Keller* after *Ellis and Abood.* On the question of mandatory bar membership, the issue presented here, *Keller* reaffirmed *Lathrop's* holding that "lawyers admitted to practice in the State may be required to join and pay dues to the State Bar." *Keller,* 496 U.S. at 4.

[5] The plaintiffs in this case do not contend that mandatory bar membership restricts, directly or indirectly, their ability to express their own views or to disagree with the positions of the Bar. Nor do they contend that membership compels them to express any particular ideas or make any particular utterances of any kind. This case is thus unlike *Wooley v. Maynard,* 430 U.S. 705 (1977), in which the Supreme Court held that a citizen cannot be compelled to display the New Hampshire state motto, "Live Free or Die," on a license plate. *See id.* at 714. Also unavailing is plaintiffs' reliance on *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.,* 475 U.S. 1 (1986) in which the Court overturned a California regulation requiring a privately owned utility to include in some of its bill mailings a letter from a private consumer group. Here none of plaintiffs' property, i.e. their dues, is being used to espouse views with which plaintiffs disagree.

Plaintiffs nevertheless contend that language in *Keller* leaves open the question whether membership alone may cause the public to identify plaintiffs with State Bar positions in violation of plaintiffs' First Amendment rights. It is difficult for us to accept plaintiffs' interpretation of this passage since the Court in *Keller* reaffirmed *Lathrop* on this very point. *See Keller,* 496 U.S. at 4. The language on which plaintiffs rely states:

> In addition to their claim for relief based on [the California Bar's] use of their mandatory dues, petitioners' complaint also requested an injunction prohibiting the State Bar from using its name to advance political and ideological causes or beliefs. This request for relief appears to implicate a much broader freedom of association claim than was at issue in *Lathrop*. Petitioners challenge not only their 'compelled financial support of group activities,' but urge that they cannot be compelled to associate with an organization that engages in political or ideological activities beyond those for which mandatory financial support is justified under the principles of *Lathrop* and *Abood*. The California courts did not address this claim, and we decline to do so in the first instance.

Id. at 17 (internal cross-references omitted). The claim reserved in *Keller* was a broader claim of violation of associational rights than was at issue in either *Lathrop* or in this case. Here, plaintiffs do not allege that they are compelled to associate in any way with the California State Bar's political activities. They do not allege that the Bar's political involvement is greater and the regulatory function less than it was when the Court decided *Keller* and *Lathrop*. The claim they make is therefore no broader than that in *Lathrop*, where the court held the regulatory function of the bar justified compelled membership. *Lathrop* controls our decision here.

The judgment of the district court is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO 97-17008
D.C No. CV- 97- 01115-GEB

BILL MORROW; BARRY KEENE; BRUCE HENDERSON,
Plaintiffs-Appellants,

v.

THE STATE BAR OF CALIFORNIA, a public corporation; MEL ASSAGAI,
Defendants-Appellees.

APPEAL FROM the United States District Court for the Eastern District of California (Sacramento).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Eastern District of California (Sacramento) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered September 2, 1999

APPENDIX B

FOR THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

[Filed September 19, 1997]

No. 97-115 GEB GGH

BILL MORROW, et al.,
Plaintiffs,

v.

THE STATE BAR OF CALIFORNIA, et al.,
Defendants.

ORDER

Defendants State Bar of California ("State Bar") and Mel Assagai move to dismiss Plaintiffs' complaint for failure to state a claim upon which relief could be granted or, in the alternative, to strike that portion of the complaint that requests injunctive relief on grounds that it is an inappropriate remedy. In their complaint, Plaintiffs' allege under 42 U.S.C. §§ 1983 and 1988 that the State Bar, an organization in which Plaintiffs must be members for their profession and livelihood, violates their rights under the First and Fourteenth Amendments when it advocates political or ideological ideas

unrelated to regulating the practice of law.[1] Plaintiffs also assert that Defendant Assagai violates their rights when he lobbies the state government on the State Bar's behalf. For the following reasons, Defendants' motion to dismiss is granted.

I. DISMISSAL STANDARDS UNDER FED. R. CIV. P. 12(b) (6)

On a motion to dismiss, the allegations of the complaint must be accepted as true. Cruz v. Beto, 405 U.S. 319, 322 (1972) . The court is bound to give the plaintiff the benefit of every reasonable inference to be drawn from the "well-pleaded" allegations of the complaint. Retail Clerks Int'l Ass'n v. Shermahorn, 373 U.S. 746, 753 n.6 (1963). The court may not dismiss the complaint for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of a claim which would entitle him to relief. Hishon v. King & Spaulding, 467 U.S. 69, 73 (1984) (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). However, dismissal is appropriate where there is a "lack of a cognizable legal theory" or "the absence of sufficient facts

---

[1] Plaintiffs claim that because they are State Bar members, they are personally associated with the State Bar's support of the following four state legislative bills: 1) AB 250, which would raise the cap on pain and suffering damages in medical negligence cases; 2) AB 75, which would prohibit civil compromises in domestic violence cases; 3) SB 48, which would permit a state claim for "hostile work environment"; and 4) AB 492, which would permit a state claim for employment discrimination on the basis of sexual orientation. Pl.'s Compl. at ¶ V.

alleged under a cognizable legal theory." Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990).

II. Discussion

It is well accepted that a state may constitutionally require lawyers to be members of the state bar. See Lathrop v. Donohue, 367 U.S. 820, 843 (1961) (rejecting claim by lawyer that compulsory membership and financial support of state bar violated First Amendment rights); Keller v. State Bar of California, 496 U.S. 1, 4 (1990) ("[L]awyers admitted to practice in the State may be required to join and pay dues to the State Bar"); O'Connor v. State of Nevada, 27 F.3d 357 (9th Cir. 1994), cert. denied 514 U.S. 1021 (1995) (recognizing that forced membership in the state bar does not violate the First Amendment). The burden on members' First Amendment right of free association is justified by the state's legitimate interest in "regulating the legal profession and improving the quality of legal services." Keller, 496 U.S. at 13. Where the only condition of membership is compulsory payment of annual dues and assessments, there is no "impingement upon protected rights of association." Lathrop, 367 U.S. at 843.

However, a state bar does not have unlimited discretion as to how it utilizes financial support from members. A state bar may not spend a dissenting member's dues for political or ideological activities that are not germane to the justification for compelled association. Keller, 496 U.S. at 13-14 (citing Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977)). This restriction does not prohibit a state bar from engaging in non-germane political activities altogether. See Abood, 431 U.S. at 235-36 (holding that a

union could spend funds for political activities not germane to collective bargaining as long as they were financed by employees who did not object). But, to avoid infringing on the First Amendment rights of its dissenting members, a state bar must implement procedures designed to prevent involuntary subsidization of such activities by these members. Keller, 496 U.S. at 17 (stating that an integrated bar could satisfy its obligation to dissenting members by adopting the type of procedures held appropriate in the analogous labor union context in Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986)).[2]

In this case, Plaintiffs do not contend that the State Bar has spent Plaintiffs' dues to advocate non-germane political positions without implementing the procedures required by Keller. Rather, Plaintiffs argue that the mere fact they are forced to be members of an organization that advocates political ideas with which they object violates their First Amendment rights. Pl.'s Compl. at ¶ VII. According to Plaintiffs, because of the public attention to the State Bar's formal position on issues, "it is impractical (and nearly impossible) for any of plaintiffs . . . to disassociate himself or herself, in the public mind, from State Bar support for these positions." Pl.'s Compl. at ¶ VI. Thus, the crux of

---

[2] The Court takes judicial notice that the State Bar has implemented procedures that permit an advance reduction in dues for members who do not support the State Bar's political or ideological activities. See Rules & Regs. of State Bar of Cal. art. 1A, § 2. "[A] court may properly look beyond the complaint to matters of public record and doing so does not convert a Rule 12(b)(6) motion to one for summary judgment." Mack v. South Bay Beer Distributors, Inc., 798 F.2d 1279, 1282 (9th Cir. 1986).

Plaintiffs' claim is that when the State Bar voices an ideological position, it is forcing each dissenting member to affirm the position against his will, thereby transgressing First Amendment rights.

The First Amendment "includes both the right to speak and the right to refrain from speaking at all." Wooley v. Maynard, 430 U.S. 705, 714 (1977). For instance, the Supreme Court has held that a person may not be compelled to publicly pledge allegiance to the flag, West Virginia State Bd. v. Barnette, 319 U.S. 624, 642 (1943), to display a state motto on his license plate, Wooley, 430 U.S. at 714-15, or to pay dues to a union for political activities unrelated to the common purpose of collective bargaining, Abood v., 431 U.S. at 235-36. Thus, First Amendment rights are implicated whenever a person is forced to make or support an expressive act.

Here, Plaintiffs have failed to allege sufficient facts to support their claim that they have been compelled to speak. Plaintiffs do not claim their membership is in any way conditioned on their affirming political statements of the State Bar. Moreover, Plaintiffs do not contend that they would be subject to any sort of penalty if they were to disagree publicly with the political stance of the State Bar. Rather, Plaintiffs support their claim only by citing their forced membership and payment of dues and the requirement of placing their state bar identification numbers on pleadings submitted in court. Pl.'s Opp'n at 1.

In short, the allegations in the complaint do not establish the requisite connection between the requirements of Plaintiffs' State Bar membership and the State Bar's speech to

state a First Amendment claim. First, compulsory membership alone does not establish the connection because it is not likely that the State Bar's position on political issues is attributed to each of its 159,000 members. Cf. Falk v. State Bar of Michigan, 342 N.W.2d 504, 513 (Mich. 1983), cert. denied, 469 U.S. 925 (1984) ("Reasonable persons are not likely to associate the bar's expressed position with [an individual] merely because he is forced to pay dues to the bar in order to practice law."). Second, the requirement of identifying one's bar membership in documents filed with courts can hardly be considered an endorsement of the State Bar's political positions. Finally, Plaintiffs are not required to pay for the State Bar's non-germane political activities. Thus, Plaintiffs fail to allege facts evincing that they have been forced to make or support politically expressive acts of the State Bar.

Accordingly, Defendants' motion to dismiss is GRANTED.

IT IS SO ORDERED.

DATED: September 16, 1997

/s/_____
GARLAND E. BURRELL, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

[Filed September 19, 1997]

No. CIV S-97-115 GEB GGH

BILL MORROW, et al.,	)
Plaintiffs,	)
	)
v.	)
	)
THE STATE BAR OF	)
CALIFORNIA, et al.,	)
Defendants.	)
	)

JUDGMENT IN A CIVIL CASE

XX - ***Decision by the Court.*** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER OF 9/19/97.

Jack L. Wagner,
Clerk of the Court

ENTERED: September 19, 1997

by: /s/_____
D. Davis, Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

[Filed June 17, 1997]

No. CIV-S-97-1115 GEB GGH

BILL MORROW, BARRY KEENE, and J. BRUCE HENDERSON, *Plaintiffs,*	)
v.	)
THE STATE BAR OF C ALIFORNIA, a public corporation; and MEL ASSAGAI, an individual, *Defendants.*	)

CIVIL RIGHTS COMPLAINT
FOR INJUNCTIVE RELIEF
[42 U.S.C. §§1983, 1988]

Plaintiffs, for their cause of action against defendants, and each of them, allege as follows:

I

This action arises under the United States Constitution, and in particular, the First and Fourteenth Amendments thereto, and under The Civil Rights Act, Title 42 of the United States Code, §§ 1983 and 1988.

II

The Court has jurisdiction of this cause under and by virtue of Title 28 of the United States Code, §1343. The United States District Court for the Eastern District of California has venue pursuant to Title 28 U.S.C. §1391.

III

Plaintiff Bill Morrow is a citizen of the United States and, by profession, a lawyer and a legislator who represents constituents of the 73rd Assembly District, which includes a part of Orange County, California where he resides. Plaintiff Barry Keene is a citizen of the United States and former member of the California State Senate. By profession he is a college professor and an attorney who resides in Sacramento County, State of California. Plaintiff J. Bruce Henderson is an attorney and a former City Council member of San Diego, California where he currently resides. As required by law, all plaintiffs are active members of the State Bar of California and pay yearly dues in the amounts mandated by the Bar.

IV

Defendant State Bar of California (hereinafter "State Bar") is a public corporation with one of its principal offices

and places of business in Sacramento, California. The State Bar is governed by a Board of Governors of 23 members, 17 of whom are members of the State Bar and six of whom are non-attorneys appointed by the governor of the State with the approval of the Senate of the State. The Bar employs lobbyists who present the position of the Board before the California Legislature and various state agencies. Defendant Mel Assagai is a registered lobbyist who resides in Sacramento and lobbies on behalf of the State Bar pursuant to contract. Defendant Assagai appears on behalf of defendant State Bar before both the legislative and executive branches and, in doing so, presents to those bodies support for and opposition to measures that neither advance the delivery of quality legal service to the public nor rationally relate to the regulation of the legal profession. In so doing, he acts at the direction of the defendant State Bar.

V

Not content with limiting itself to matters that improve the quality of legal services or concern the regulation of the legal profession, defendant State Bar, through the lobbyists with whom it contracts and employs, engages in propaganda in support of ideological and political matters which deeply divide the professional legal community. The State Bar's involvement in ideological and political matters is done with full knowledge that large parts of the membership of the State Bar disagree with those positions and often hold a position contrary to that which is announced as the position of the State Bar. The State Bar, however, purports to speak for the entire membership, including those who, like plaintiffs, disagree with various ideological and political positions adopted by defendant State Bar and who, like plaintiffs, are

not free to disassociate themselves from the State Bar without abandoning their profession and livelihood. In the 1997-1998 bi-annual session of the California Legislature, the State Bar has taken the following positions in support of legislation that is purely political and ideological and has no rational relationship to the purposes for which plaintiffs pay yearly dues:

(a) AB 250 (Kuehl) would replace the $250,000 ceiling on pain and suffering damages in medical negligence cases (Cal.Civ.C. §3333.2) with a $750,000 ceiling whenever a variety of circumstances occur and with no ceiling whatsoever under other circumstances. These various circumstances essentially amount to the exceptions swallowing the present rule limiting non-economic damages. The Board took this action at the request of one segment of the legal profession -- the organized plaintiffs' bar, commonly called Trial Lawyers and also as the Consumer Attorneys of California -- and in spite of the pleas of other attorneys who asked the Board of Governors not to involve their name in behalf of a political football to which they were philosophically opposed;

(b) AB 75 (Allay) would prohibit civil compromises in all domestic violence cases;

(c) SB 48 (Solis) would add a "hostile work environment" as a ground of sexual harassment so that an employee who feels that he or she encountered conduct unwelcome and sufficiently severe or pervasive to constitute an offensive working environment would be able to obtain compensatory and punitive damages against an employer;

(d) AB 492 (Keeley) would permit actual, compensatory and punitive damages to be awarded for discrimination or different treatment in any aspect of employment or opportunity for employment based on actual or perceived sexual orientation.

VI

Plaintiff Bill Morrow opposes AB 250, SB 48 and AB 492. Plaintiff Barry Keene opposes AB 250 and AB 75 and, while not opposed to SB 48 and AB 492, does not support them either and does not wish to be associated with support for these measures. Plaintiff J. Bruce Henderson opposes all of these aforementioned bills. That the State Bar supports these measures has received considerable recognition in media throughout the State, but it is impractical (and nearly impossible) for any of the plaintiffs, in this state of 32 million people, to disassociate himself or herself, in the public mind, from State Bar support for these positions.

VII

The requirement that plaintiffs be members of the State Bar in order to practice their profession unconstitutionally requires that they also be associated with political and ideological positions of the State Bar unrelated to regulation of the profession or improvement in the quality of legal services. This requirement is unconstitutional in that it violates plaintiffs' Freedoms of Speech and Association as guaranteed by the First and Fourteenth Amendments to the United States Constitution.

WHEREFORE, plaintiffs respectfully pray:

1. That this court issue a preliminary injunction restraining defendants, and each of them, their agents and employees, and anyone in concert with them, from publicly supporting or opposing any matters pending before any governmental unit, including the public acting in its initiative or referendum capacities, except as to matters indubitably concerning the quality of legal services or discipline of members of the legal profession absent a unanimous expression of support by the State Bar's membership for a political or ideological excursions;

2. That this Court issue a permanent injunction restraining defendants, and each of them, their agents and employees, and anyone in concert with them, from publicly supporting or opposing any matters pending before any governmental unit, including the public acting in its initiative or referendum capacities, except as to matters indubitably concerning the quality of legal services or discipline of members of the legal profession absent a unanimous expression of support by the State Bar's membership for a political or ideological excursions;

3. That plaintiffs be awarded their attorneys' fees;

4. That plaintiffs be awarded their costs;

5. That this Court grant any further and other relief deemed appropriate.

Dated: June 16, 1997

FRED J. HIESTAND
PAUL N. HALVONIK

By: /s/_____
FRED J. HIESTAND
Attorneys for Plaintiff

APPENDIX D

[Dated October 11, 1997]

GOVERNOR PETE WILSON

To the Members of the California Senate:

I am returning Senate Bill No. 1145 without my signature.

This bill would authorize the State Bar to collect annual bar dues from its members for the years 1998 and 1999. The dues would be reduced by $20 and the annual amount frozen until January 1, 2000. This bill also would authorize the State Bar to continue collecting an additional fee of $110 to be used exclusively for discipline augmentation during the same timeframe noted above.

The State Bar is authorized to regulate the practice of law in California. It licenses, regulates, and has the authority to discipline nearly 122,000 attorneys in California. The California Bar is a mandatory bar in that all California attorneys must be members in order to practice law. Its fee-based budget exceeds $65 million annually.

Last year, a substantial minority of bar members voted to abolish the mandatory bar in favor of a voluntary model embraced in ten other states. This difference of opinion as to the mandatory nature of the Bar is at the heart of what might be charitably characterized as an almost chronic disharmony.

Simply stated, some members believe that the Bar cannot function effectively as both a regulatory and disciplinary agency as well as a trade organization designed to promote the legal profession and collegial discourse among its members.

In addition to the conflict inherent in the Bar's multiple functions, recent lawsuits illustrate the long held belief of some members that the Bar is partisan, representing the views of the most vocal while excluding or opposing the interests of others.

Some of these less favored members were vindicated in 1990 when the U.S. Supreme Court in *Keller v. State Bar of California* 496 U.S. 1, concluded that the Bar had impermissibly spent bar dues to promote political positions which did not comport with some of its members.

The bar has responded to *Keller* by conducting business as usual while offering a minuscule rebate to those opposed. Unappeased, several bar members (including one former and one current member of the Legislature) sued this year asserting that the Bar had violated its members' rights by taking positions on legislation with which members disagree.

In recent months, as disgruntled members have leveled charges that the Bar is bloated, arrogant, oblivious, and unresponsive, the Bar has promptly done its best to verify each indictment.

During the past year the Bar has, in no particular order:

- Entered into a $900,000 contract with its former executive officer to provide lobbying services for two years. The contract initially included an illegal $75,000 bonus to be paid if this bill were signed into law.

- Hired a new executive officer for $200,000 per annum plus perks.

- Endorsed legislation which would increase liability limits in medical malpractice cases over the objection of the civil defense bar.

- Resisted proposals to significantly reduce bar dues, calling instead for a $20 annual reduction in dues offset by the extension of a $110 per year increase in dues.

- Resisted, in fact deleted, amendments to this bill which would have required a Bar dues bill next year and thus increased legislative oversight.

Members of the California Bar currently pay $478 in annual bar dues. Two studies, one by the State Auditor and another by a committee chaired by U.S. Court of Appeals Judge Arthur Alarcon, found a significant glut in the Bar's budget and called for a substantial reduction. In the case of the Alarcon Committee, the recommended reduction was $79 per year. Indeed, California bar dues are more than twice the average of the other forty-nine states, which is approximately $200 per year. None of this appears to be of any consequence to the Bar, but then the Bar's own small army of staff attorneys pays no bar dues at all.

Message of Governor Pete Wilson - 10/11/97

At the end of a tumultuous legislative year, the State Bar last month conducted its annual convention in San Diego where delegates promptly got down to business and adopted resolutions:

- in favor of legalizing same sex marriages
- to prohibit discrimination against transvestites and transsexuals
- to reduce penalties for drug dealers
- to reduce penalties for repeat child molesters
- to thwart the will of the voters relative to affirmative action at state law schools

It is difficult to draw a clear conclusion as to the direction of the California State Bar. Created in 1927, the Bar is designed to act as an arm of the California Supreme Court with responsibility for regulating the legal profession and promoting fair and efficient administration of justice. The Bar has drifted, however, and become lost, its ultimate mission obscured. It is now part magazine publisher, part real estate investor, part travel agent, and part social critic, commingling its responsibilities and revenues in a manner which creates an almost-constant appearance of impropriety.

It is time for the Bar to get back to basics: admissions, discipline and educational standards. I would look with favor upon a bill that required Bar members to pay only for functions which were, in fact, a mandatory part of a responsible, cost efficient regulatory process: a process which

would require the Bar, in word and deed, to scrupulously heed Thomas Jefferson's admonition that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical."

Cordially,

/s/_____

PETE WILSON

Supreme Court, U.S.
FILED
DEC 30 1999
CLERK

(2)

No. 99-938

IN THE
SUPREME COURT OF THE UNITED STATES

BILL MORROW, BARRY KEENE,
and BRUCE HENDERSON,

Petitioners,

v.

THE STATE BAR OF CALIFORNIA,
And MEL ASSAGAI,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Mark W. Danis (Bar No. 147948)
Morrison & Foerster
12636 High Bluff Drive, Ste. 300
San Diego, CA 92130-2071
Telephone: (858) 720-5100
Facsimile: (858) 720-5125

Marie M. Moffat (Bar No. 62167)
Lawrence C. Yee (Bar No. 84208)
Dina E. Goldman (Bar No. 142601)
Office of General Counsel
The State Bar of California
180 Howard Street
San Francisco, CA 94105-1639
Telephone: (415) 538-2270
Facsimile: (415) 538-2321

Counsel for Respondents

ZIPP

TABLE OF CONTENTS

		Pages
I.	*Lathrop, Keller* and Related Cases Are Dispositive of Petitioner's Alleged Freedom of Association Claim	1
II.	Petitioners Cannot Establish That They Are Forcibly Associated With Legislative Positions Taken By The State Bar	11
III.	This Case Should Not Be Held In Abeyance Pending This Court's Decision in *Board of Regents of the University of Wisconsin* v. *Southworth.*	15
IV	Conclusion	16

TABLE OF AUTHORITIES

Pages

Cases

Abood v. Detroit Board of Education, 431 U.S. 209, 978 S.Ct. 1782, 51 L.Ed.2d 261 (1977) 8-9

Board of Regents of the University of Wisconsin System v. *Southworth*, 119 S.Ct. 1332 (1999) 16

Glickman v. Wileman Bros. & Elliott, 521 U.S. 457, 117 S.Ct. 2130, 128 L.Ed.2d 585 (1997) 7,8

Kaimowitz v. The Florida Bar, 996 F.2d 1151 (11th Cir. 1993) 9

Keller v. State Bar of California, 496 U.S. 1, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990) 1,6,7,9

Lathrop v. Donohue, 367 U.S. 820, 81 S.Ct. 2228, 6 L.Ed. 1191 (1961) 2,,4,6,11,13

Morrow v. State Bar of California, 188 F.3d 1174 (9th Cir. 1999) 1

Pacific Gas & Electric Company v. Public Utility Commission of California, 475 U.S. 1, 106 S.Ct. 903, 89 L.Ed.2d 1 (1986) 13,14

Roberts v. United States Jaycees, 468 U.S. 609, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984) 7,11

West Virginia Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943) 7

Wooley v. Maynard, 430 U.S. 705 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977) 7

Respondents the State Bar of California and Mel Assagai[1] respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 188 F.3d 1174 (9th Cir. 1999).

I. *Lathrop*, *Keller* and Related Cases Are Dispositive of Petitioners' Alleged Freedom of Association Claim.

Pursuant to this Court's decision in *Keller* v. *State Bar of California*, 496 U.S. 1, 110 S. Ct. 2228, 110 L.Ed.2d 1 (1990), the State Bar cannot use bar dues paid by Petitioners for political or ideological legislative or other speech activities that are unrelated to the Bar's interest in regulating the legal profession or improving the quality of legal services. Petitioners make

---

[1] Assagai was the State Bar's former Senior Executive for Governmental Affairs, who was retained under an independent contractor agreement as lobbyist when this action was filed. (Petition for Writ of Certiorari, App. C, 21a.) That contract expired in January 1999.

clear that they do not challenge any such expenditure of their dues, but rather allege that their constitutional right to freedom of association is violated because they are forced to belong to an organization that takes positions on legislative bills with which they disagree. (Petition for Writ of Certiorari ("Petition"), 6.) Consistent with this Court's decisions in *Keller* and *Lathrop*, the Ninth Circuit properly held that membership enrollment alone, without any other aspect of governmental compulsion, burden or restraint, does not present any valid claim of First Amendment infringement.

In *Lathrop* v. *Donohue*, 367 U.S. 820, 81 S.Ct. 2228, 6 L.Ed. 1191 (1961) this Court held that a lawyer's right to freedom of association is not violated where his required membership in the bar imposes no conditions other than the requirement to pay dues. *Lathrop*, 367 U.S. at 843. Petitioners deny the impact that *Lathrop* has on their case by misstating the Court's

decision, claiming that *Lathrop* has no holding beyond the decision of a plurality of the Court that no constitutional question was properly before them. (Petition, 13-15.) As correctly noted by the Ninth Circuit and the District Court below, Petitioners' contention is incorrect. As a fair reading of *Lathrop* clearly reveals, the Court considered two constitutional questions, ruling on only one of them. The *Lathrop* appeal was from a judgment in which:

> The [Wisconsin] Supreme Court held that the requirement that appellant be an enrolled dues-paying member of the State Bar did not abridge his *rights of freedom of association*, and also that his *rights to free speech* were not violated because the State Bar used his money to support legislation with which he disagreed.

Lathrop, 367 U.S. at 823 (emphasis added). Thus, in *Lathrop*, the Court considered two questions: 1) did compulsory membership in the State Bar abridge Lathrop's freedom of association; and 2) did the State Bar's use of mandatory dues for lobbying of legislation with which Lathrop disagreed violate his freedom of speech?

On the first question, whether Lathrop's right to freedom of association was abridged, the Court clearly did rule. Finding no "impingement upon protected rights of association, four members of the Court framed the issue in terms identical to that presented by Petitioners' claim:

> The core of appellant's argument is that he cannot constitutionally be compelled to join and give support to an organization which has among its functions the expression of opinion on

legislative matters and which utilizes its property, funds and employees for the purposes of influencing legislation and public opinion toward legislation. But *his compulsory enrollment imposes only the duty to pay dues.* The Supreme Court of Wisconsin so interpreted its order and its interpretation is of course binding on us. The court said: "The rules and by-laws of the State Bar, as approved by this court, *do not compel the plaintiff to associate with anyone. He is free to attend or not to attend its meetings or vote in its elections as he chooses. The only compulsion to which he has been subjected by the integration of the bar is the payment of the annual dues of $15 per year."* We therefore are

> confronted, as we were in Railway Employees' Department v. Hanson, 351 U.S. 225, 76 S.Ct. 714, 100 L.Ed. 1112 (1956), only with a question of *compelled financial support of group activities, not with involuntary membership in any other aspect.*

Lathrop, at 827-828 (footnotes and citations omitted) (emphasis added). Two additional members of the Court concurred that compelled Bar membership did not infringe the plaintiff's freedom of association. So, as noted in *Keller*, six members of the Court in *Lathrop* rejected the freedom of association claim. *Keller*, 496 U.S. at 7, 8. The *Lathrop* court did not rule on the second question before it, whether the plaintiff's freedom of speech rights were violated by the forced expenditure of money on support of legislative positions with which he disagreed. *Lathrop*, at 845; *Keller*, at 9.

The holding in *Lathrop* controls Petitioners' alleged freedom of association claim. The fact that the State Bar may engage in legislative activity or that some of its legislative positions may have an ideological tinge, *Keller* at 9, is immaterial when there are no complaints about compelled financial contributions to fund this activity. Government actions implicate freedoms of speech and association only if there are some aspects of the action that compel, burden, or restrain activities protected by the First Amendment. *Roberts* v. *United States Jaycees*, 468 U.S. 609, 622-23, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984); *see Glickman* v. *Wileman Bros. & Elliot*, 521 U.S. 457, 469-71, 117 S.Ct. 2130, 2138, 2139, 128 L.Ed.2d 585 (1997). The cases cited by Petitioners, *Wooley* v. *Maynard*, 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977) and *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943) involve such constitutionally

prohibited compulsion of speech. *Wooley* concerned a state law which required car owners to carry the state's motto, "Live Free or Die" on their car license plates. *Barnette* involved a school board's resolution to require students to stand for the pledge of allegiance. However, in this case, Petitioners allege no compulsion beyond payment of membership fees (to which they do not complain). As this Court noted in *Glickman*, 521 U.S. at 469 n. 13, the absence of compulsion to engage in speech distinguishes *Wooley* and *Barnette*. And, as *Lathrop* held, where there is no compulsion beyond payment of dues, there is no cognizable freedom of association claim.[2]

---

[2] When Petitioners complain about forced membership in the State Bar of California because it engages in political activity with which they disagree, they are really objecting to and seeking to enjoin activities paid for by *non-objecting* members. As the Supreme Court decision in *Abood*, provides, Petitioners have no such claim for relief. *Abood* v.

The Ninth Circuit's holding in this case is consistent with that of the Eleventh Circuit. Applying *Lathrop*, the Eleventh Circuit considered and rejected a claim identical to that raised by Petitioners. The Eleventh Circuit adopted the district court's memorandum opinion and affirmed the lower court's judgment. The Eleventh Circuit found that the Florida bar had adopted refund procedures that satisfied the requirements of *Keller* and *Hudson* and, finding that the plaintiff did not object to the amount of the refund, held that there was no valid constitutional challenge to his payment of bar dues. *Kaimowitz* v. *The Florida Bar*, 996 F.2d 1151, 1154 (11th Cir. 1993). Noting that plaintiff, a lawyer seeking to "disassociate himself from

---

Detroit Board of Education, 431 U.S. 209, 235-236, 239 n. 4, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977); *Keller*, 496 U.S. at 9.

the Florida bar" was asserting a freedom of association claim not involving the compulsory payment of bar dues, the Eleventh Circuit held that the reasoning in *Lathrop* would control.

> Plaintiff also asserts in the complaint that his compelled association with the Florida bar violates his First Amendment right to freedom of association. . . . [*Keller*] dealt only with compulsory payment of bar dues, not with the constitutionality of compulsory membership in and of itself. That issue was decided by the Supreme Court in 1961, in a decision on which the *Keller* court relied heavily. . . . The *Lathrop* decision controls Plaintiff's claim regarding compulsory bar membership, and the Defendants' motion [for

summary judgment] is due to be granted

on that claim as well.

Id., at 1154.

II Petitioners Cannot Establish That They Are Forcibly Associated With Legislative Positions Taken By The State Bar.

Petitioners assert that, because they must belong to the State Bar to practice law, they are "thus *forced* to be associated with respondent Bar's speech." (Petition, 20.) However, when the organization at issue has hundreds of thousands of members, it is most unlikely that a member of the general public would attribute a legislative position taken by the State Bar to one of its individual members. Such a large and unselective group is not an intimate association. *Roberts* v. *United States Jaycees*, 469 U.S. at 621. Large and unselective associations simply do not possess the shared community of thoughts, experiences, and beliefs of intimate associations. *Id.*, at 620. As Justice Harlan

said in his concurring opinion in *Lathrop*,

> [T]he State Bar's purpose of furthering expression of views is unconnected with any desire to induce belief or conviction by the device of forcing a person to identify himself with the expression of such view. True, purpose may not be controlling when the identification is *intimate* between the person who wishes to remain silent and the beliefs foisted upon him. ***But no such situation exists here where the connection between the payment of an individual's dues and the views to which he objects is factually so remote. Surely the Wisconsin Supreme Court is right when it says that petitioner can be expected to realize that "everyone understands or should***

understand" that the views expressed are those "of the State Bar as an entity separate and distinct from each individual."

Lathrop, 367 U.S., 859 (Citation omitted) (Emphasis added).

The district court below also properly concluded that the legislative positions of the State Bar are unlikely to be attributed to its individual members. "[C]ompulsory membership alone does not establish the connection because it is not likely that the State Bar's position on political issues is attributed to each of its 159,000 members." (Petition, App. B, 16a.)

Petitioners' reliance on *Pacific Gas & Electric Company* v. *Public Utility Commission of California*, 475 U.S. 1, 106 S.Ct. 903, 89 L.Ed.2d 1 (1986) to support their argument is misplaced. In *Pacific Gas*, this Court struck down a regulation that forced a

privately-owned utility to include with the mailing of its monthly bills to its customers an editorial newsletter published by a consumer group which was strongly critical of the utility's rate making practices. *Id.*, at 13, 15. In a plurality opinion, the Court stated that in order to avoid the appearance that it agreed with the group's views, the utility would "feel compelled to respond to arguments and allegations made by the [group] in its messages." *Id.*, at 16.

Unlike the facts of *Pacific Gas*, Petitioners in this case are not required to advocate any position whatsoever, much less display messages or disseminate views on behalf of the State Bar. Indeed, the only "displayed" message about which Petitioners complained below was the court rule requirement that lawyers demonstrate their admission to practice law by including their State Bar number in all pleadings. How placing their bar number on court pleadings would

necessarily associate Petitioners with legislative positions taken by the State Bar is not clear. As the district court stated: "the requirement of identifying one's bar membership in documents filed with courts can hardly be considered an endorsement of the State Bar's political positions. (Petition, App. B, 16a.)

III This Case Should Not Be Held In Abeyance Pending This Court's Decision in *Board of Regents of the University of Wisconsin* v. *Southworth.*

Since Petitioners do not challenge their payment of mandatory State Bar membership fees, their request that this Court hold this case pending a decision in *Board of Regents of the University of Wisconsin v. Southworth* should be disregarded. The petition for writ of certiorari in *Southworth* was granted limited to the following question: "[w]hether the First Amendment is offended by a policy or program under which public university students must pay mandatory fees that are

used in part to support organizations that engage in political speech." *Board of Regents of the University of Wisconsin System* v. *Southworth*, 119 S.Ct. 1332-1333 (1999). Petitioners raise a distinct First Amendment challenge based on compelled membership in the State Bar of California. Thus, there is no reason for this Court to hold this case pending its decision in *Southworth*.

IV Conclusion

This case presents no important unsettled federal question warranting review by this Court. Rather, the issue is one long resolved by this Court's analysis in *Lathrop*. The Ninth Circuit opinion below correctly applied *Lathrop*. The Ninth Circuit's analysis is consistent with the Eleventh Circuit's earlier decision in *Kaimowitz* and therefore presents no conflict in the circuits. Accordingly, for this and all the reasons stated

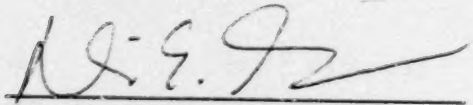
above, the petition for writ of certiorari should be denied.

Dated: December 30, 1999

Respectfully submitted,

Mark W. Danis

Marie M. Moffat
Lawrence C. Yee
Dina E. Goldman



Dina E. Goldman

Attorneys for Respondents

DECLARATION OF SERVICE BY MAIL

I, Joan Sundt, declare as follows: I am a citizen of the United States and a resident of the City and County of San Francisco, that my business address is The State Bar of California, 180 Howard Street, San Francisco, California 94105

On December 30, 1999, following ordinary business practice, I placed for collection and mailing at the offices of the State Bar of California, 180 Howard Street, San Francisco, California 94105, three copies of Respondents' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI, addressed to counsel for petitioner as follows:

Paul N. Halvonik	Fred J. Heistand
2600 Tenth Street	1121 L Street
Suite 511	Suite 404
Berkeley, CA 94710	Sacramento, CA 95814

I am readily familiar with the State Bar of California's practice for collection and processing correspondence for mailing with the United States Postal Service and, in the ordinary course of business, the correspondence would be deposited with the U.S. Postal Service on the day on which it is collected at the business.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at San Francisco, California this 30th day of December, 1999.